

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF INDIANA  
NEW ALBANY DIVISION

IN RE: : CASE NO. 10-93904-BHL-11  
EASTERN LIVESTOCK CO., LLC, : (Judge Basil H. Lorch III)  
Debtor. :  
: **REPLY OF THE FIRST BANK AND**  
: **TRUST COMPANY TO**  
: **FIFTH THIRD BANK'S**  
: **OBJECTION TO FIRST BANK'S**  
: **MOTION TO MODIFY PLAN**  
: **INJUNCTION**  
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The arguments raised in First Bank's Reply to the Eastern Livestock Trustee's Objection apply equally to the objections raised by Fifth Third Bank ("Fifth Third") as well. Nearly all of Fifth Third's objections are premised on the assumption that First Bank is seeking a determination in this Court that Eastern Livestock Co., LLC ("ELC") has no claim to the Commodity Account Funds. That is clearly not the case.

While, as Fifth Third asserts, ELC may have a variety of claims against the Gibson estate, none of those claims (e.g., the claim arising out of the promissory note referenced in ELC's proof of claim) are even remotely relevant to the Motion or proposed complaint to the extent that they merely assert unsecured claims against the Gibson estate. While Fifth Third speculates that ELC may have other equitable defenses to the application of Section 546(a), ELC's response does not assert that ELC possesses any such defenses and the relief sought in the Motion before the Court does not prevent ELC from raising such defenses, if any, in any future proceedings in the Gibson Case. Moreover, the distinction between a jurisdictional bar and an

affirmative defense is irrelevant as a practical matter where the parties in interest are fully aware of the existence of the defense and have every intention of asserting it.

Fifth Third's further assertion, that the possible existence of the Trustee's setoff rights or other defenses to claims that might be brought by the Gibson Trustee against the ELC Estate somehow precludes the Court from determining the claims to the Commodity Account Funds, is irrelevant even if First Bank's Motion had sought to determine that ELC is barred from asserting an avoidance action relating to the Commodity Account Funds by reason of Section 546(a). The law is well settled that an avoidance action that is barred by Section 546(a) may nevertheless be asserted by way of setoff or counterclaim.

Nor does the Motion before the Court seek to adjudicate the ELC Trustee's proof of claim that was filed in the Gibson Case. The Gibson Case is the proper forum in which to adjudicate claims to the Commodity Account Funds held by the Gibson Trustee and to address the ELC Trustee's proof of claim.

Finally, Fifth Third's statement that the Motion presumes that Fifth Third has no independent claim to Commodity Account Funds is misplaced and neither relevant nor germane in the context of this Motion; the Gibson Case is the proper forum to address the arguments of Fifth Third, Fifth Third being not only a participant in that case but also a named party in First Bank's proposed complaint.

#### CONCLUSION

For the reasons stated in First Bank's Reply to Eastern Livestock Trustee's Objection to First Bank's Motion to Modify Plan Injunction and for the reasons stated above,

First Bank's Motion seeking this Court's permission to name ELC as a party to the proposed complaint to be filed in the Gibson Case should be granted.

Respectfully submitted,

/s/ Bret S. Clement

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**CERTIFICATE OF SERVICE**

I certify that on the 24<sup>th</sup> day of March, 2014, I electronically filed the foregoing Reply of The First Bank and Trust Company to Fifth Third Bank's Objection to First Bank's Motion to Modify Plan Injunction with the Clerk of Courts using the CM/ECF system, which will send notification of such filing to CM/ECF participants, and I hereby certify that I have mailed by United States Postal Service the document to the non-CM/ECF participants:

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